## APPENDIX.

---

**Dissenting opinion of Commissioner Clark in Richmond Chamber of Commerce v. Seaboard Air Line Railway, et al., 44 I. C. C. 455, 477-480; Trans., pp. 59-62.**

---

CLARK, *Commissioner,* dissenting:

I agree to the views of the majority with regard to the situation at Norfolk. I can not agree to their conclusions as to the situation at Richmond. I am especially at variance with the majority views as to the interpretation and application of section 2 of the act. This section in its terms is free from ambiguity. It refers to and prohibits only one thing, to wit, charging "any person or persons a greater or less compensation for any service rendered * * * in the transportation of * * * property subject to the provisions of the act" than is charged "any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions."

In the illustration given in the majority report a person shipping from Oxford via the Southern Railway to point B in Richmond pays exactly the same charge that another person shipping via the same line from Oxford to point A in Richmond pays. The service to point B is all performed by the Southern, and it

retains all the earnings. In making delivery at point A, however, it must employ as its agent the Seaboard Air Line, and it pays the Seaboard Air Line's switching charge for that delivery; but the two shippers have paid exactly the same amounts.

I do not think that the holdings of the Supreme Court of the United States in *Wight* v. *United States,* 167 U. S., 512, which, by the way, was a criminal prosecution for actual rebating, have any application here, and I think that this view is amply supported by what the same court said in *I. C. C.* v. *Alabama Midland Ry. Co.,* 168 U. S., 144, decided not long after the *Wight Case* was decided. In the *Alabama Midland Case* the court took pains to avoid misinterpretation of what it had said in the *Wight Case* by saying:

> As we have shown in the recent case of *Wight* v. *United States,* 167 U. S., 512, the purpose of the second section is to enforce equality between shippers over the same line, and to prohibit any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor; and we there held that the phrase "under substantially similar circumstances and conditions," as used in the second section, refers to the matter of carriage and does not include competition between rival routes.
>
> This view is not open to the criticism that different meanings are attributed to the same words when found in different sections of the act; for what we hold is that, as the purposes of the several sections are different, the phrase under consideration must be read, in the second section, as restricted to the case of shippers over the same road, thus leaving no room for the operation of competition, but that in the other sections, which

cover the entire tract of interstate and foreign commerce, a meaning must be given to the phrase wide enough to include all the facts that have a legitimate bearing on the situation—among which we find the fact of competition when it affects rates.

In order further to guard against any misapprehension of the scope of our decision it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of "undue or unreasonable preference or advantage," or what are "substantially similar circumstances and conditions." The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the Commission or the courts from taking that matter into consideration.

While condemning all discriminations that are unjust and all preferences and prejudices that are undue, the manifest purpose of the Congress in this legislation was to promote and encourage free, fair, and open competition between carriers. The Commission is authorized to prescribe only the reasonable maximum charge which the carrier may assess. The carrier may charge less than that reasonable maximum if it chooses to do so. This Commission has frequently said that in meeting competition a carrier may, by its election, do many things which it could not be required against its will to do. For many years it has been a general custom for carriers by railroad to secure the road haul

on traffic which could be hauled by another carrier through payment or absorption of the switching charges necessary to be paid in order to have the traffic switched for it by another carrier at point of origin or of destination. There has been no secret about this practice; it is and for many years has been practically universal, and is and has been provided for in the carriers' tariffs. The practice was general before the *Wight Case* was decided and has been equally general ever since that time, and it has not until now been suggested that it involved or constituted violation of section 2 of the act.

In *T. & P. Ry.* v. *I. C. C.*, 162 U. S., 197, 219, the Supreme Court of the United States said:

> Commerce, in its largest sense, must be deemed to be one of the most important subjects of legislation, and an intention to promote and facilitate it, and not to hamper or destroy it, is naturally to be attributed to Congress. The very terms of the statute, that charges must be *reasonable*, that discrimination must not be *unjust*, and that preference or advantage to any particular person, firm, corporation, or locality must not be *undue* or *unreasonable*, necessarily imply that strict uniformity is not to be enforced; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers, and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act.

This expression was quoted with approval by the same court in *S. P. Co.* v. *I. C. C.*, 200 U. S., 536, 552.

In *Transit Case*, 24 I. C. C., 340, 350, this Commission said:

> The act is an aid, not a hindrance, to commerce, and must be given such reasonable construction as makes to that end.

The interpretation of section 2 by the majority in the instant case will, in actual practice and in a practical way, be nothing less than revolutionary.

Of course, the purposes, principles, and substantive provisions of the act must be preserved, guarded, and observed. At the same time the fact should be recognized that we are dealing with a very practical question which involves the operation and efficiency of an industry stupendous in magnitude and vital to the welfare and the life of commerce and industry in our na tion. If A ships from Oxford via the Southern Railway to point B in Richmond and B ships from Oxford via the Seaboard Air Line to point B in Richmond and under public tariffs they pay exactly the same sums for the services rendered, there is open and fair competition between the Southern and the Seaboard Air Line for the competitive traffic. It is of no public concern that one of these carriers employs the other to perform for it a part of the services. The principle is the same as that which underlies a joint through rate. The only difference is in the manner of publishing the rate.

It seems not inappropriate to note where the decision of the majority logically, aye, inevitably leads. If it is a violation of section 2 for the Southern Railway to charge a shipper the same sum for transporting each of two cars from Oxford, one delivered at point A and one at point B in Richmond, and to pay the Seaboard Air Line for switching the car to point A, thus retaining somewhat less net earnings on the car deliv-

ered at A than on the car delivered at B, it follows that it is also a violation of section 2 for a carrier to accept for an identical service on its own line different compensation in the form of local rates and divisions of joint rates on traffic of the same character coming from different points of origin or destined to different points. Every carrier of importance has its local rates applicable between the termini of its own line. It joins with other carriers in joint through rates from and to points beyond its own line, of which it receives agreed upon divisions which are generally less than its local rates and which vary according to points of origin and destination, although it hauls these different shipments of the same commodity between the same points on its own line and in the same train. If this is a violation of section 2, then all joint rates are unlawful, unless they are made by combining the full local rates of the carriers participating therein.

It must also follow that proportional rates less than local rates for the same haul on a given carrier's line are in violation of section 2, and yet in the recently enacted Panama Canal act the Congress specifically authorized the Commission to prescribe proportional rates, and defined proportional rates as "those which differ from the corresponding local rates."

It is well established that whenever it is possible to do so a legislative act should be construed in such way as to give effect to all of its provisions. Section 4 of the act prohibits charging a greater compensation for a shorter than for a longer distance over the same line or route in the same direction where the shorter haul is included within the longer, except when and to the extent that the Commission, after investigation, permits the charging of less for the longer than for the

shorter distance. If the fact that in the instant case the carrier retains less revenue on one shipment than it does on another constitutes violation of section 2, the application of that principle to instances in which a carrier performs the same service on two shipments, as to one of which it earns or retains lower revenue than on the other, would invalidate relief granted by the Commission under section 4 and nullify the manifest intent of that section, in which the Commission is specifically authorized to grant relief.

I am authorized to say that COMMISSIONER CLEMENTS concurs in these views.

# CONTENTS.


| | Page. |
|---|---|
| STATEMENT OF THE CASE | 1–8 |
| Parties in interest | 1, 4 |
| Practice in controversy | 1, 2 |
| Findings of fact by the Commission | 2, 3, 29, 33 |
| Order of the Commission | 4 |
| Petition in District Court | 4 |
| Pleadings | 4 |
| Hearing and opinion of the District Court | 4, 5 |
| Appeal, assignment of errors | 6, 7 |
| Sole question involved | 7 |
| ARGUMENT | 8–37 |
| I. The switching of cars performed by and for the line carrier in the receipt and delivery of freight is service essential to and embraced within the undertaking to transport the property | 8 |
| II. Interpretation of section 2 by this court | 15 |
| 1. Party Rate case | 16 |
| 2. Import Rate case | 17 |
| 3. Wight case | 19 |
| 4. Alabama Midland case | 21 |
| 5. Forwarding case | 22 |
| 6. Sheldon Forwarding case | 24 |
| 7. Discussion of the case at bar | 25 |
| III. Findings of fact by the Commission | 33 |
| Questions of fact to be determined | 33 |
| Commission's findings of fact conclusive | 33, 34 |
| CONCLUSION | 35 |


## TABLE OF CASES CITED.


| | |
|---|---|
| *Atchison, Topeka & Santa Fe Rwy. Co.* v. *United States*, 232 U. S. 199, 221 | 34 |
| *Baltimore & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 431, 495 | 34 |
| *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, 135 | 12 |
| *Illinois Central R. R.* v. *Louisiana R. R. Comm.*, 236 U. S. 157 | 8 |
| *I. C. C.* v. *Baltimore & Ohio R. Co.*, 145 U. S. 263, 281 | 16 |
| *I. C. C.* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235, 252, 253 | 5, 22 |
| *I. C. C.* v. *Detroit, G. H. & M. R. R. Co.*, 167 U. S., 633, 644 | 27 |
| *I. C. C.* v. *Chicago, etc., R. Co.*, 186 U. S. 320 | 12 |
| *I. C. C.* v. *Union Pacific R. R. Co.*, 222 U. S., 541, 547, 548 | 34 |
| *I. C. C.* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 92 | 34 |

| | Page. |
|---|---|
| *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 17 | 20 |
| *L. & N. R. Co.* v. *United States*, 238 U. S. 1 | 28 |
| *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 444, 445, 446 | 24 |
| *Los Angeles Switching Case*, 234 U. S. 294, 310 | 8, 29 |
| *North Penna. R. Co.* v. *Commercial Bank*, 123 U. S. 727, 734 | 12 |
| *Procter & Gamble* v. *United States*, 225 U. S. 282, 297, 298 | 33 |
| *St. Louis S. W. Ry. Co.* v. *United States*, 245 U. S. 136, 139 | 31 |
| *Texas & P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197 | 17 |
| *United States* v. *Louis. & Nash. R. R.*, 235 U. S. 314, 320 | 5 |
| *Wight* v. *United States*, 167 U. S. 512 | 19 |

# In the Supreme Court of the United States.

OCTOBER TERM, 1920.

SEABOARD AIR LINE RAILWAY COMPANY, Seaboard Air Line Railway, Southern Railway Company, and Atlantic Coast Line Railroad Company, appellants,

*v.*

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, and the Richmond Chamber of Commerce, appellees.

No. 27.

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.*

## BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

### STATEMENT OF THE CASE.

The appellants, together with the Chesapeake & Ohio Railway Co. and the Richmond, Fredericksburg and Potomac Railroad Co., have a defined switching district at Richmond, Va., and each company publishes switching rates to be applied in switching cars to and from rail connections and industries located upon their respective lines within the district. Each carrier receives and delivers at Richmond all carload

freight, transported upon its own line, to any industry located upon its line for the Richmond rate, no switching charge being made therefor. Where carload traffic is shipped from or to an industry "off line" within the switching district the cars are transferred by the line carrier, for delivery, to the carrier upon whose line the industry is located. In off-line deliveries appellants absorb the switching charges of the carrier making the deliveries to the consignees, when the switching carrier is in competition with appellants for the traffic at a common point of origin or destination, but refuse to absorb such switching charges for like traffic, between Richmond and the same points, where there is no competition for the traffic with the switching carrier. Like absorptions of switching charges are made in cases of receipts of traffic from such industries and upon the same condition.

The Commission found that:

> It is a general rule among the carriers serving Richmond that switching charges will only be absorbed when compelled by competition.
> * * *
> The Coast Line, the Seaboard, and the Southern treat as competitive only that traffic for which the switching line is in competition with the line-haul carrier. In other words, the Chesapeake & Ohio and the Richmond, Fredericksburg & Potomac absorb switching charges on traffic destined to or coming from all common points irrespective of whether or not the switching carrier reaches the common

> point with its own rails, while the southern carriers will absorb the switching charges only on traffic to and from a community which the switching line actually reaches. (Commission's Rep., Rec., pp. 45, 46.)[1]

The contention of the appellants before the Commission is stated in the report of the Commission (Rec., p. 46) as follows:

> The location of an industry upon the rails of the carrier reaching the common point constitutes a substantially dissimilar circumstance within section 3; and that section 2 is inapplicable, since the service performed from the point of origin to an industry upon a competing line-haul carrier's rails is not "under substantially similar circumstances and conditions" to that performed in the transportation to an industry otherwise situated.

The Commission found, as a fact—

> that the practice of the southern lines of absorbing switching charges only when the switching line actually competes with the line-haul carrier on traffic to or from industries at Richmond under substantially similar circumstances and conditions as defined in section 2 is unlawful. (Rec., p. 50.)

The Commission also found that if the switching charges in two cases were different in amount because of difference in the distances the cars were switched, the cases would not be similar; that is to say, as between two shippers if the published switch-

[1] All references to the record in this brief are to the printed record.

ing charge to one industry was $5 and to another $2, the absorption of the latter would not require the absorption of the full amount of the former.

An order was entered by the Commission on the 28th day of April, 1917, requiring the appellants—

> to cease and desist, on or before August 1, 1917, and thereafter to abstain, from absorbing switching charges on certain interstate carload freight at Richmond, Va., while refusing to absorb such charges on like carload shipments for a like and contemporaneous service under substantially similar circumstances and conditions, such practices having been found in said supplemental report to be unjustly discriminatory and unlawful within section 2 of the act to regulate commerce. (Rec., p. 63.)

By two subsequent orders the effective date of the order was extended to January 1, 1918.

On November 6, 1917, the appellants filed a petition in the District Court of the United States for the Eastern District of Virginia stating their contention and praying for an interlocutory and final injunction restraining the enforcement, operation and execution of said order. (Rec., pp. 2 to 19, inclusive.)

The United States and the Interstate Commerce Commission on November 16 and 17, 1917, respectively filed motions to dismiss the petition, setting forth the grounds of their motions. (Rec., pp. 71, 72.) The Richmond Chamber of Commerce was allowed to intervene as a party defendant.

The cause was heard upon the petition and motions to dismiss on November 17, 1917, before Circuit

Judges Pritchard and Woods and District Judge Waddill, jr. On January 19, 1918, an order was entered sustaining the motions of the defendants and dismissing the petition. (Rec., p. 81.) The opinion of the court was rendered by Pritchard, circuit judge, on January 19, 1918 (Rec., pp. 74 to 78, inclusive) and a dissenting opinion was filed by Woods, circuit judge. (Rec., pp. 78 to 81, inclusive.)

The opinion of the district court concludes as follows:

> We are of opinion that the act in question confers upon the Interstate Commerce Commission the power of determining as to whether the services rendered are "like and contemporaneous"; also as to whether the respective traffic was "of a like kind." Further, as to whether the transportation was made under "substantially similar circumstances and conditions." (*Texas & P. R. Co.* v. *I. C. C.*, 162 U. S. 197.) While the act does not undertake to define the particular acts which constitute unlawful discrimination, it undoubtedly commits that to the Commission and its findings are conclusive. (*I. C. C.* v. *Ill. Cent R. Co.*, 215 U. S. 452; *I. C. C.* v. *D. L. & W.*, 220 U. S. 235; *Pa. R. Co.* v. *International Coal Co.*, 230 U. S. 184; *U. S.* v. *L. & N. R. Co.*, 235 U. S. 314.)
>
> The findings of fact by the Commission are conclusive, and we concur with them in their conclusions of law. Therefore, we are of opinion that the petitioners are not entitled to the relief for which they pray, and this being a case where only injunctive relief is sought the peti-

tion will be denied and the bill dismissed. (Rec., p. 78.)

Appellants appealed to this court and assigned as errors (1) that—

> In a case where the switching charges are absorbed the freight moves between a point outside of Virginia and an industry in Richmond, the through transportation between origin and destination being made up of the movement over the tracks of the carrier performing the line haul and the additional movement over the tracks at Richmond of the carrier, or carriers, performing the switching haul to or from the industry and the separately published tariffs of the line-haul and switching carrier, or carriers, taken together provide for, and govern, the through transportation and through charges from origin to destination. In a case where the switching charges are not absorbed the freight moves between the same point outside of Virginia as in the other case of the absorption, but a different industry in Richmond. The through movement from origin to destination in the latter case is over the tracks of the same petitioner as line-haul carrier, but of a different switching carrier, or carriers, at Richmond, and, in most instances, via a different point of connection and interchange in said city, and the separately published tariffs of the line-haul and switching carrier, or carriers, in such case, taken together, provide for and govern the through transportation and total charges from origin to destina-

tion. The through route and service, when the charges are absorbed, are not the same route and service as when the charges are not absorbed, nor are the same through rates provided by the tariffs. The transportation service is not "like" in both cases or over the same lines, or for the same distance, nor is it performed under substantially similar circumstances and conditions within the meaning of said section 2.

Assignments 2, 3, and 4 are general to the effect that the court erred in denying the prayer of the petition and sustaining the motions to dismiss.

The sole question involved is whether appellants, in order to get the business from another switching carrier on whose line, within the switching district at Richmond, the consignor's or consignee's industry is located, may absorb the charge for the receipt or delivery of shipments within the switching district, and refuse to absorb like charges for like switching services within the district for shipments transported over their lines "under substantially similar circumstances and conditions" where there is no competition with the switching carrier for the traffic and because of the absence of such competition the shipments can be secured without absorbing the switching charge. In other words, may the admitted discrimination between shippers to and from Richmond, which the Commission has found to be unjust, be justified by showing competition between some of the carriers involved?

The argument of this case in this court was passed during Federal control of the railroads, during which time they were operated with other roads as a unit. The roads having been returned to the private owners, the question involved is now a vital issue.

## ARGUMENT.

### I.

**The switching of cars performed by and for the line carrier in the receipt and delivery of freight is service essential to, and embraced within, the undertaking to transport the property.**

A common carrier undertakes in every transportation service to perform three acts: (1) To receive the traffic offered under established rates; (2) to move the traffic over its line from the city of origin to the city of destination; and (3) to deliver the traffic to the consignee. These three acts constitute one transaction of transportation; "the line-haul rate embraces a receiving and delivering service." (*Los Angeles Switching case*, 234 U. S. 294, 310.) The switching of empty cars for the purpose of being loaded with goods intended for interstate commerce and the switching and placing of a loaded car "on some terminal or industrial track for delivery" constitute a part of the interstate movement. (*Illinois Central Railroad* v. *Louisiana Railroad Comm.*, 236 U. S. 157.)

The mode of receipt and delivery of less-than-car-load traffic differs carrier's services in receiv-

ing and delivering carload traffic. This is necessarily so because less-than-carload traffic is loaded from the depot into the car and unloaded from the car into the depot by the carrier. In some cases the carrier furnishes a trap-car service for the collection and delivery of less-than-carload traffic. On the other hand, generally speaking, carload traffic, excepting live stock, is loaded by the shipper and unloaded by the consignee. This necessitates the placing of the empty car at a point where it can be loaded by the shipper and the loaded car at a point where it can be unloaded by the consignee. This service is performed by carriers in various ways according to the custom, rules, and regulations of the place at which the traffic is received or delivered. Ordinarily the empty car is placed either upon a team track or a siding, or "spotted" at the door of a warehouse or elevator upon a sidetrack for loading; and when loaded the carrier takes the car from the loading point to its yard, where trains are made up and the car is finally placed in a train *for* transporting. Upon arrival at the city of destination the train goes to what is known as the "break-up yards" of the carrier, where the cars are uncoupled and each car is moved by the carrier to a team track or spotted at a warehouse or elevator, or is shunted upon a private siding. (Hutchinson on Carriers, third edition, sec. 711.) These three performances are different in kind, but under the American system are all covered, unless otherwise specified in the tariffs, by the line-haul rate. Under the English system a different

practice prevails, where a strict account is kept of terminal services and different charges for different kinds of services are applied.

The act to regulate commerce uses the word "transportation" in many parts of the act, and, to make its provisions apply to all kinds of services involved in the carrier's undertaking, section 1 defines the word "transportation" to include not only the transporting of property from city to city, but also "all services in connection with the receipt, delivery," etc., of the traffic. The transportation of the traffic from city to city is "the line haul"; the services performed by the carrier in connection with the receipt and delivery of carload traffic is known and designated as "switching" or "terminal service." At each large terminal there are designated "switching limits" or districts within which the switching service in connection with the receipt and delivery of carload traffic is performed. These switching limits in a large city are defined and include all lines of railroad serving the city. The roads have connections with each other for the convenience of the public giving shippers access to and from each road within the switching limits. The switching service in connection with the receipt and delivery of particular carload freight may be performed in part by a carrier other than the line-haul carrier. That is to say, if a shipment is to be made by an industry located within the switching district upon the line of carrier A, to a place in another State upon the line of carrier B, carrier A

moves the car to a connection with carrier B's line, where carrier B takes it and moves it to its make-up yards to be later coupled into a train going to the point of destination. The whole service by both carriers from the industry to the make-up yards of carrier B is a receiving service, a car movement, and in no sense is it a line-haul service, which is a train movement. Where two carriers participate in such a switching service carrier A acts as the agent of carrier B in the receipt of the traffic. Precisely the same kind of movements occur in delivering a car to a consignee off the line of the transporting carrier. The petition of the appellants clearly states the facts upon this point and says:

> The aforesaid service of transportation of an inbound or outbound loaded car between the industry and the tracks of the line-haul carrier is commonly known and is referred to hereinafter as a "switching service." The carrier performing the switching service is known and is referred to hereinafter as the "switching carrier" as distinguished from the line-haul carrier, *and the switching carrier in all such cases is said to switch for the line-haul carrier.* [Italics ours.] (Rec., pp. 3, 4, 5.)

If the line-haul carrier has no direct rail connection with the carrier on whose line the industry is located, then the receipt or delivery is made, the petition states, "*through the agency* of an intermediate company." (Rec., p. 3.)

The switching carriers are in no sense performing a separate line service; it is simply a car movement in receiving or delivering *a car* from or to the industry; the switching carriers are the agents acting for the line carrier in making *its receipt or delivery* of freight which it has transported or is to transport between cities or towns in train movement. The whole performance, the receipt of the car, the line haul, and the delivery to the consignee, is a fulfillment of a single undertaking by the line carrier.

> The carrier must at all times be in proper condition both to receive from the shipper and to deliver to the consignee, according to the nature of the property to be transported, as well as to the necessities of the respective localities in which it is received and delivered. (*Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128, 135; *North Penna. R. Co.* v. *Commercial Bank*, 123 U. S. 727, 734; *Inter. Com. Comm.* v. *Chicago, etc., R. Co.*, 186 U. S. 320.)

All such switching to and from industries on its own tracks or sidings within the switching limits at Richmond are made by the line carrier as a delivery or receiving service "without any added charge over and above the charges accruing under the said line-haul rate." (Petition, Rec., p. 7.)

Without discussing the right of the line-haul carrier to charge the shipper for such receipt and delivery terminal services, on-line and off-line, that issue not being in this case, it is clear that under the custom prevailing for many years in Richmond as alleged in the petition (Rec., pp. 6, 7), the appellants

and other carriers have recognized the right of shippers and consignees to designate an industry on any line within the switching limits at Richmond from which they will receive and to which they will deliver traffic in connection with line transportation. These receipts and deliveries, whether made from industries upon the line-carrier's railroad or upon the railroad of another carrier, constitute the receipt and delivery of carload traffic within the switching limits. To make such receipts and deliveries is the duty and undertaking of every line carrier. "Delivery in a proper manner may doubtless be provided for by contract, *but in the absence of any specific provision upon the subject it is determined very largely by custom.*" (Elliott on Railroads, second edition, vol. 4, secs. 1521, 1522, and cases cited.)

TERMINAL CHARGES.

Under the interstate commerce act it is conceded that carriers have the right to make reasonable charges for terminal services, *provided* no unjust discrimination is made *between shippers* of like traffic. In the Los Angeles case this court said (p. 310):

> The Commission conceded the right of the carrier to charge for any terminal service that was accessorial. But it was held that an additional charge was not justified if additional service was not in fact rendered.
>
> Nor do we understand that the Commission ruled that the receipt and delivery of goods at plants located upon spurs or sidetracks could not, in any circumstances, be regarded as a

> distinct service for which separate compensasation might be demanded. * * *
>
> On the other hand, it can not be maintained that the delivery and receipt of goods on industrial spur tracks within the switching limits in a city is necessarily an added service for which the carrier is entitled to make, or should make, a charge additional to the line-haul rate to or from that city, when the line-haul rate embraces a receiving and delivering service for which the spur-track service is a substitute.

But the right of the appellants to charge shippers for receipts and deliveries from and to industries "off line" was not questioned in this case, nor was the reasonableness of such charges under consideration. The sole question was and is, May the appellants absorb the off-line switching charges for one shipper and refuse to absorb them for another shipper of like traffic over their own lines to and from Richmond?

The point we desire to impress under this heading is that it is a part of the line carrier's undertaking to receive carload traffic which it offers to transport at the point of loading and to deliver the traffic, after it has been transported, to the consignee. And if by a general custom, which is admitted to exist at Richmond, the carriers have established switching limits within which carload shipments are to be received from and delivered to industries within such limits, upon whatever road they may be located, by or for the line carrier, the duty rests upon

the line carrier to receive and deliver every carload shipment according "to the necessities of the respective localities in which it is received and delivered," and that the whole performance is a unitary act of transportation. If the charges made by other switching carriers "for the line-haul carrier" are absorbed for one shipper, they must be absorbed for every contemporaneous shipper of like traffic transported on their respective lines between Richmond and interstate points "under substantially similar circumstances and conditions."

## II.

### Interpretation of Section 2 by this Court.

Section 2 of the interstate commerce act, as it existed at the time of the hearing of this case before the Commission, reads as follows:

> That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property * * * subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation * * * of a like kind of traffic * * * under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which

is hereby prohibited and declared to be unlawful.

1. PARTY RATE CASE.—In *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad Co.* (145 U. S. 263, 281) this court held that there was a substantial difference in the carriage of ten or more persons on a party-rate ticket and where only one person was transported on a single ticket, and therefore the selling of party-rate tickets at a less rate than the single fare did not create an unjust discrimination against the person paying an individual fare. The court said (p. 284):

> In order to constitute an unjust discrimination under section 2, the carrier must charge or receive directly from 1 person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate, or other device; but, in either case, it must be for a "like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions." To bring the present case within the words of this section, we must assume that the transportation of 10 persons on a single ticket is substantially identical with the transportation of 1, and, in view of the universally accepted fact that a man may buy, contract, or manufacture on a large scale cheaper proportionately than upon a small scale, this is impossible.
>
> * * * * *
>
> It is possible to conceive that party-rate tickets may, by a reduction of the number for

> whom they may be issued, be made the pretext for evading the law, and for the purpose of cutting rates, but should such be the case the courts would have no difficulty in discovering the purpose for which they were issued, and applying the proper remedy.

This case had reference to passenger traffic. It may be stated that the same general doctrine has been recognized and applied in the transportation of property in carloads as distinguished from less-than-ca.. ad traffic. The former is different from the latter in the loading and unloading, and in receiving revenue from a full-loaded car instead of a partly loaded car. These are considerations which may be truly said to affect the carriage.

2. IMPORT RATE CASE.—In *Texas & Pacific Railway* v. *Interstate Commerce Commission* (162 U. S. 197) this court found that the section was based on section 90 known as the "equality clause" of the English act of 1845, and held that the traffic was not the same or "like" and was not transported under the same circumstances and conditions where it came to a port as foreign freight by water, as freight originating at the port, and that this affected the matter of carriage. The court said (p. 218):

> As we have already said, it could not be supposed that Congress in regulating commerce would intend to forbid or destroy an existing branch of commerce of value to the common carriers *and to the consumers within the United States.*

* * * * *

> The principal purpose of the second section is to prevent unjust discrimination between shippers. It implies that, in deciding whether differences in charges, in given cases, were or were not unjust, there must be a consideration of the several questions whether the services rendered were "like and contemporaneous," whether the kinds of traffic were "like," whether the transportation was effected under "substantially similar circumstances and conditions." To answer such questions, in any case coming before the Commission, requires an investigation into the facts; and we think that Congress must have intended that whatever would be regarded by common carriers, apart from the operation of the statute, as matters which warranted differences in charges ought to be considered in forming a judgment whether such differences were or were not "unjust."

This does not mean that a carrier's interest in *getting traffic through competition* will justify a difference in the treatment of shippers. This would be giving paramount consideration to the interest of the carrier. The public interest is paramount and gave rise to the law in the second section of the interstate commerce act. In the question then before the court, the transportation of foreign shipments and the increase of foreign trade, the public had a direct interest as well as the carrier, and this fact might be considered in determining whether the discrimination was unjust within the meaning of section 2.

3. In *Wight* v. *United States* (167 U. S. 512) the section was construed by this court as follows:

> The wrong prohibited by the section is a discrimination between shippers. It was designed *to compel every carrier to give equal rights to all shippers over its own road and to forbid it by any device to enforce higher charges against one than another.* Counsel insist that the purpose of the section was not to prohibit a carrier from rendering more service to one shipper than to another for the same charge, but only that for the same service the charge should be equal, and that the effect of this arrangement was simply the rendering to Mr. Bruening of a little greater service for the 15 cents than it did to Mr. Wolf. They say that the section contains no prohibition of extra service or extra privileges to one shipper over that rendered to another.

The controversy in that case arose by the Baltimore & Ohio allowing a shipper 3½ cents for performing the delivery service for the carrier. The reason assigned was that the Baltimore & Ohio could not secure the business without making the allowance, thereby putting itself on an equal footing with its competitor. Upon this question the court said:

> Whatever the Baltimore & Ohio Co. might lawfully do to draw business from a competing line, whatever inducements it might offer to the customers of that competing line to induce them to change their carrier, is not a question involved in this case. The wrong

> prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road and to forbid it by any device to enforce higher charges against one than another.
>
> * * * * *
>
> It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor.

The ruling in the Wight case may be summarized as follows: (1) Under section 2 only *matters of carriage* can be considered in determining what is like traffic under substantially similar circumstances and conditions, and that *competition can not be considered* in determining whether an allowance for special service may be made to one shipper and not made to another; and (2) that an allowance for cartage, which is a part of the delivery service of the carrier, can not be made to one shipper and refused to another where the traffic is like and contemporaneous and moved under substantially similar circumstances and conditions by the line-haul carrier. That this was a proceeding on an indictment called for no different rule of construction. The section is "to be construed sensibly, and with a view to the object aimed at by the legislature." (*Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 17.)

4. INTERPRETATION OF THE PHRASE "UNDER SUBSTANTIALLY SIMILAR CIRCUMSTANCES AND CONDITIONS."—In *Interstate Commerce Commission* v. *Alabama Midland Railway Co.* (168 U. S. 144, 166, 167) the court was considering the phrase "substantially similar circumstances and conditions" as then found in section 4 of the act. It was not claimed that the case came within the provisions of section 2, but the court discussed the meaning of the same language used in section 2. Referring to the Wight case, the court said:

> The purpose of the second section is to enforce equality between shippers over the same line and to prohibit any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor, and we there held that the phrase "under substantially similar circumstances and conditions," as used in the second section, *refers to the matter of carriage and does not include competition between rival routes.*

And then proceeded to show that the difference in the purposes of sections 2 and 4 was controlling in applying the phrase. Section 4 having for its purpose the prevention of a different evil—the "long and short haul" provision—competition might be considered in section 4 cases, whereas it could not be considered in a case falling under the provisions of section 2.

5. THE FORWARDING CASE.—In *Interstate Commerce Commission* v. *Delaware, Lackawanna & Western Railroad Co.* (220 U. S. 235, 252, 253) the railroad contended that forwarding agents collecting less-than-carload lots to which the less-than-carload rates applied, putting them into carloads and shipping at carload rates deprived the carriers of a large amount of revenue to which they were justly entitled; that is to say, had the shipments been made by the owners of the freight the less-than-carload rates, which were higher, would have applied; therefore, *to protect their revenues*, the carriers discriminated between forwarding agents and "owners" of freight contemporaneously shipped under substantially similar circumstances and conditions. The court referred again to the fact that section 2 was taken from section 90 of the English railroad consolidation act of 1845, known as the "equality clause," then summarized the decisions of the English courts at the time of the passage of the interstate commerce act, and said:

> That clause in the English act had been construed as only embracing circumstances concerning the carriage of the goods, and not the person of the sender; or, in other words, that the clause did not allow carriers by railroad to make a difference in rates because of differences in circumstances arising either before the service of the carrier began or after it was terminated. * * * And it may not be doubted that the settled meaning which was affixed to the English equality clause at

> the time of the adoption of the act to regulate commerce applies in construing the second section of that act; certainly to the extent that its interpretation is involved in the matter before us. (Citing the Wight and Alabama Midland cases.)

Referring to the argument of the carriers that this practice might result in a withdrawal of the carload rates, so beneficial to the public, to protect the revenues of the company, the court said:

> In the interest of the public it is urged a limitation should not be now enforced which would compel the carrier to withdraw the facilities which shippers enjoy by the voluntary act of the carriers. But the proposition rests upon the fallacious assumption that because a carrier has the authority to fix rates it has the right to discriminate as to those who shall be entitled to avail of them.

Here, again, this court met the argument of "necessity" and ruled that the necessity of a carrier, to get business by competition, was not to be considered in construing and applying the prohibition of section 2; that, as stated in the former cases, the *controlling matters for consideration were those affecting carriage and not competition.* If the carriage or transportation was substantially different, section 2 would not apply; but if the service performed by the carrier for one shipper was substantially like, contemporaneous, and under the same circumstances and conditions, the carrier could make no discrimination,

which the Commission found to be unjust, either by rebates, additional services, or other devices.

6. FORWARDING CASE.—In *Lehigh Valley Railroad Co.* v. *United States* (243 U. S. 444, 445, 446) an allowance was made to Sheldon & Co., forwarding agents for importers, for a "varying percentage upon the published rates and also a salary of $5,000 a year." In this case the forwarder was given a special consideration to induce shipments over the rail carrier's line. The court held that it came within the Forwarding case and "however honest and however justifiable on commercial principles, [it] would be contrary to the act to regulate commerce as it now stands." Referring to section 2 and the Wight case, the court then said:

> Of course it does not matter whether the allowance takes the form of *a deduction* or a cross payment. Any payment made by a carrier to a shipper in consideration of his shipping goods over the carrier's line comes within the prohibiting words.
>
> * * * * *
>
> The services rendered by George W. Sheldon & Co., although in a practical sense "connected with such transportation," *were not connected with it as a necessary part of the carriage*—were not "transportation service," * * * [Italics ours.]

This case holds that any consideration paid to or received by a shipper which induces shipment, but which does not affect carriage or the transportation, is, if it creates a discrimination which the Commis-

sion finds to be unjust, within the provisions of section 2.

7. THE CASE AT BAR.—After these clear expositions of the law in the cases cited, we need state only two illustrations of the clear working of the practice condemned in the present case, bearing in mind that a transportation service by a single line carrier embraces the receipt of the car and the delivery of it to the consignee within the switching district at Richmond.

(1) Two shippers at the same point in the State of Georgia respectively ship, by the Southern Railroad, a car of potatoes to Richmond to be delivered to different consignees within the switching district. The carrier accepts the cars and transports them to Richmond in the same train; from its break-up yards it delivers the car belonging to A to the consignee upon another line within the switching district and pays the other switching carrier a charge of $3, the published rate, for making a part of that delivery for the Southern Railroad; it absorbs this switching charge *because the switching railroad is in competition with the Southern* at the point of origin. In precisely the same manner it transports and delivers the carload shipped by B to the consignee within the switching district, paying a switching charge of $3 to the switching carrier, but refuses to absorb the $3 for B *on the ground that there was no competition compelling it.* Can it be said that these two contemporaneous shippers from the same point over the Southern Railroad to Richmond have been

treated alike? The goods conveyed were a carload of potatoes in both cases; they moved over the same line to Richmond and they were delivered by the line carrier to the respective consignees under the same rules regulating line-carrier deliveries to consignees within the switching district at Richmond, and yet B is compelled to pay for that single service $3 more than A, and the only excuse made for this discrimination is that *competition at the point of origin* with the switching carrier compelled the absorption of the switching charge *in order to get the business.* Precisely the practice and argument that was made in the Wight case. As there was no *competition* with the switching carrier as to B's carload, they took from B all they could get under a different and nondiscriminatory rule which the carriers might properly have adopted, charging the switching charge to every shipper calling for offline deliveries. But to make the charge to B and absorb it for A is a clear violation of section 2. Such a discrimination, illustrated above, may occur in respect of traffic originating at any point on the lines of the appellants where competitive conditions with switching carriers at Richmond exist.

(2) Take another illustration. Two factories producing precisely the same product are located within the switching district at Richmond but upon different rail lines. They are competing for business throughout the territory served by the appellants. They both load and ship at the same time in car lots their

fabrications or products, which are precisely alike, to the same point on the Southern Railroad. When A comes to pay his freight bill he is charged the Richmond rate to the point of destination plus $3 for switching in the receipt of the traffic by the Southern. The same switching for receipt of the traffic is done for B, but the $3 is absorbed by the Southern because of the competitive conditions above stated. Are these two industries treated alike by the Southern Railway? The shipments are the same, the movement is the same in both cases, but the charges by the Southern Railway are $3 different on a carload.

To state these cases makes it apparent that there are hundreds of cases falling within the operation of this practice which are clearly in violation of section 2. No wonder that the Chamber of Commerce of Richmond, looking after the commercial growth of the city, reaching out to all parts of the country for trade in its products, found that this practice of charging one industry for switching and at the same time absorbing the switching charge of another under precisely similar conditions worked a serious disadvantage to the industries and impeded the commercial growth of the city.

But it is said there was some difference in the distance of the switching movement. This is immaterial to the Southern for the switching charges were the same.

In *Interstate Commerce Commission* v. *Detroit, Grand Haven & Milwaukee Railway Co.* (167 U. S. 633, 644), where there was in fact a difference as to

distance between Ionia and Grand Rapids, the court said:

> There is, conventionally, no difference, as to distance, between Ionia and Grand Rapids, and the same rates and charges for like kinds of property are properly made in the case of both cities.

The rates being the same to both places, the question whether accessorial delivery service at Grand Rapids was an unjust discrimination against the shippers at Ionia, where no such service was rendered, was considered and the court suggested:

> It may be that it was open for the Commission to entertain a complaint of the Ionia merchants that such a course of conduct was in conflict with sections 2 and 3 of the act; but, as we have seen, such questions, if they really arose in the proceedings before the Commission and in the circuit court, have been withdrawn from our consideration in this appeal from the decree of the circuit court of appeals.

We cite this case only to show that a difference in the *actual distance* over which two cars are hauled, in a single line haul including receipt and delivery, is not material in determining a case arising under section 2, if the *rates are the same as to both* shipments. Distance is not controlling in rate making. (*L. & N. R. Co.* v. *United States*, 238 U. S. 1. So long as the switching charge covers a fixed distance within the switching limits it makes no difference whether the car of one shipper is hauled 100

feet and that of another 5 miles, the charge being the same for each switching service. In the Los Angeles case, speaking upon this subject of distance, the court said (p. 313):

> The carrier did not fix a charge according to the comparative service in the case of these various industrial plants. It made the same switching charge whether the distance was 200 feet or 7 miles; that is, it dealt with the situation upon an average basis making the same charge for all this switching in a given area which constituted its terminal district. It was the service within those switching limits that the Commission was considering. Manifestly it was permissible to establish such a district, and taking the team-track and freight-shed service in that area and the average spur-track service, the Commission reached the conclusion set forth.

The only question in such cases is whether the charge is the same for the switching service in each case. The Commission's report stated (Rec., p. 50):

> We do not consider that the carriers must absorb the switching charges indiscriminately to all industries within the switching limits of Richmond if they choose to absorb the switching charges to any one industry off their rails. The illegality herein found to exist is the receiving of a greater compensation for one service than for a like service under substantially similar circumstances and conditions. To take a concrete example and referring again to the

> diagram: Suppose industry C were 5 miles distant from the interchange tracks of the Seaboard, while industry B were only 2 miles distant. Suppose the Chesapeake & Ohio's switching charge amounted to $5, while that of the Southern was $2. If the Seaboard absorbed the Southern's $2 switching charge on traffic to industry B, we do not consider that it must absorb the entire $5 switching charge of the Chesapeake & Ohio on traffic to industry C, but only to the extent to which the service is similar. In other words, it would probably be necessary for the Seaboard to absorb $2 of the $5 charge of the Chesapeake & Ohio.

It is also contended by appellants' counsel that this is a "through route" over different lines of railroad. A through route consists of two or more *line hauls*. The service of receiving, transferring, and delivering traffic over a through route, by switching services, is incidental and is embraced within the line-haul rate. Section 6 of the act providing for the filing of rates says:

> The schedules printed as aforesaid by any such common carrier shall plainly state the *places between which property and passengers will be carried,* * * * *and shall also state separately all terminal charges.* * * * [Italics ours.]

That is to say, the line-haul charges from place to place are to be stated and if there are any switching or terminal charges connected with the line-haul movement such terminal charges shall also be stated.

Section 6 also provides that schedules shall show the rates—

> for transportation between points on its own *route* and points on the *route* of any other carrier by railroad.

In other words, the joint or through rates cover two or more line hauls, not a line haul and terminal or switching service. The Commission, speaking upon this point, said:

> A through route is a continuous line of railway formed by an arrangement, express or implied, between connecting carriers. It must have a rate for every service it offers, and, as the route is a new unit—*one line formed of two or more connecting lines*—so its rate for every service is a unit, even though it be divided between the several carriers arranging themselves into the through route. (*Through Routes and Through Rates*, 12 I. C. C. 163, 166.) [Italics ours.]

In *St. Louis Southwestern Railway Co.* v. *United States* (245 U. S. 136, 139, N. 2) this court said:

> A "through route" is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point *on the line of one carrier to destination on the line of another.* [Italics ours.]

The petition states the facts as follows:

> Petitioners aver that the transportation service from the point of origin to the industry at Richmond, as already set out, is not ended

> or concluded until the property transported is delivered at said industry. The line-haul movement of the originating carrier to its point of connection at Richmond with the delivering carrier upon whose tracks the industry is located is but a part of such through transportation. The haul by such connecting line *for delivery* to the industry is necessary to complete the through transportation.

A single-line haul with a delivery to the consignee does not constitute in any true sense a through route. It is a one-line haul and, as before stated, the receipt of the traffic from the shipper and its delivery to the consignee are embraced within the line-haul service and rate.

Counsel for appellants claim that the diagram used as an illustration is not a correct map of the situation. The answer is that it does not pretend to be a map, but is only given as an illustration of the working of the appellants' practice in absorbing switching charges for one and not absorbing them for another shipper. The exact location of the "break-up"and the "make-up" yards of the carriers is not a material factor. These yards can be placed wherever the carrier finds it convenient in making up and breaking up its trains. The important fact is that the trains are there made up, and broken up, *for the purpose* of making receipts and deliveries from and to every point within the Richmond switching district.

## III.

### Findings of fact by the Commission.

In the Import Rate case the court, referring to the questions involved in section 2, said (219):

> The principal purpose of the second section is to prevent unjust discrimination between shippers. It implies that, in deciding whether differences in charges, in given cases, were or were not unjust, there must be a consideration of the several questions whether the services rendered were "like and contemporaneous," whether the kinds of traffic were "like," whether the transportation was effected under "substantially similar circumstances and conditions." To answer such questions, in any case coming before the Commission, requires an investigation into the facts.

Prior to the passage of the Hepburn Act the court reviewed these questions of fact. Counsel for appellants have cited some of the older cases and seem to desire the court to exercise the same jurisdiction in this case. In *Procter & Gamble* v. *United States* (225 U. S. 282, 297, 298) this court said:

> Originally the duty of the courts to determine whether an order of the Commission should or should not be enforced carried with it the obligation to consider both the facts and the law. But it had come to pass prior to the passage of the act creating the Commerce Court that in considering the subject of orders of the Commission for the purpose of enforcing

> or restraining their enforcement the courts were confined by statutory operation to determining whether there had been violations of the Constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred, although it may be not technically doing so.

In *United States* v. *Louisville & Nashville Railroad* (235 U. S. 314, 320) the court said:

> It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed.

Referring to the findings of the Commission in the Los Angeles Switching case, the court said (p. 311): "Assuming that they were based upon evidence, they are not open to review." (Citing *Baltimore & Ohio Railroad Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481, 495; *Interstate Commerce Commission* v. *Delaware, Lackawanna & Western Railroad Co.*, 220 U. S. 235, 251; *Interstate Commerce Commission* v. *Union Pacific Railroad Co.*, 222 U. S. 541, 547, 548; *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Co.*, 227 U. S. 88, 92; *Atchison, Topeka & Santa Fe Railway Co.* v. *United States*, 232 U. S. 199, 221.)

CONCLUSION.

The practice of the appellants under consideration by the Commission was undisputed and is clearly stated in the petition in this case. (Rec., pp. 8 and 9.) Appellants justify the discrimination as follows:

> The reason for the absorption and payment of switching charges by the line-haul carrier, as described and illustrated above, is that the switching carrier, upon whose tracks at Richmond the industry is located, is an active competitor with the line-haul carrier, upon whose tracks the industry is not located, for the line-haul transportation of the traffic to or from Richmond. (Rec., p. 9.)

And, as the line carrier delivers free to any industry upon its own terminal tracks, the petition avers that if the practice of absorbing the switching charges of a competing carrier upon whose tracks the industry is located were not absorbed "the result would be, * * * that the carrier upon whose tracks the industry is not located would obtain for its own route to or from Richmond no part of the transportation service." * * * (Rec., p. 9.)

With this admitted practice before it and the reasons assigned by the appellants for its adoption and enforcement, the Commission passed upon the following questions of fact: Are single line shipments for different shippers, over either appellant's line, to or from points on the line to or from Richmond, including a receipt or delivery within the switching limits at Richmond regardless of whose tracks the

industry is located upon, "like" and contemporaneous shipments "under substantially similar circumstances and conditions"? Upon this question the Commission found:

> It is the line-haul movement which that section primarily contemplates. Where the short delivery service within the switching district is substantially the same in either instance, we are of the opinion that the line-haul carrier is receiving a greater compensation from one shipper than from another for a like service when it absorbs the switching charges of one switching line and not those of another.
>
> * * * * *
>
> We are of the opinion, therefore, and find, that the practice of the southern lines of absorbing switching charges only when the switching line actually competes with the line-haul carrier on traffic to or from industries at Richmond under substantially similar circumstances and conditions as defined in section 2 is unlawful.

There is no claim made in the petition that the appellants did not have a full and fair hearing before the Commission, or that the Commission did not follow the procedure prescribed by the statute, or that the provisions of section 2, properly applied, deprive the appellants of any constitutional right, and no claim that there was no substantial evidence before the Commission to support the order, for the facts are admitted. We submit that under the de-

cisions of this court above cited the district court committed no error in holding that:

> While the act does not undertake to define the particular acts which constitute unlawful discrimination, it undoubtedly commits that to the Commission and its findings are conclusive.

Therefore the judgment of the district court should be affirmed.

Respectfully submitted.

CHARLES W. NEEDHAM,
*Assistant Counsel.*

P. J. FARRELL,
*Of Counsel.*

OCTOBER, 1920.

○

# CONTENTS.


| | Page. |
|---|---|
| Statement | 1 |
| Order of the Commission | 5 |
| Brief and Argument | 7 |
| I. The findings of the Commission are conclusive that the traffic on which the switching charges are absorbed or nonabsorbed is handled in the Richmond switching district under similar circumstances and conditions | 7 |
| *A. T. & S. F. Ry. Co.* v. *United States*, 231 U. S. 736 | 14 |
| *B. & O. R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481, 494 | 11 |
| *C. H. & D. Ry. Co.* v. *I. C. C.*, 206 U. S. 142, 154 | 11 |
| *I. C. C.* v. *C. R. I. & P. Ry. Co.*, 218 U. S. 88, 110 | 10 |
| *I. C. C.* v. *I. C. R. R. Co.*, 215 U. S. 452, 470, 477, 478 | 10 |
| *I. C. C.* v. *L. & N. R. R. Co.*, 227 U. S. 88 | 14 |
| *I. C. C.* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547 | 10 |
| *I. C. R. R. Co.* v. *I. C. C.*, 206 U. S. 454 | 10 |
| *I. C. R. R. Co.* v. *I. C. C.*, 206 U. S. 441, 457, 459, 466 | 11 |
| *I. C. R. R. Co.* v. *I. C. C.*, 206 U. S. 441, 465 | 12 |
| *Los Angeles Switching Case*, 234 U. S. 294 | 14 |
| *L. & N. R. R. Co.* v. *United States*, 238 U. S. 1 | 14 |
| *O'Keefe, Receiver*, v. *United States*, 240 U. S. 294 | 14 |
| *Penn. R. R. Co.* v. *United States*, 236 U. S. 351 | 14 |
| *Pre-cooling Case*, 232 U. S. 199 | 14 |
| *Procter & Gamble Co.* v. *United States*, 225 U. S. 282 | 14 |
| *Texas & Pacific Ry. Co.* v. *I. C. C.*, 162 U. S. 197, 233 | 7 |
| *United States* v. *L. & N. R. R. Co.*, 235 U. S. 314 | 12 |
| *United States* v. *M. & M. Traffic Assoc.*, 242 U. S. 178 | 14 |
| Section 2, act to regulate commerce, 24 Stat. 379 | 7 |

II. The phrase "under substantially similar circumstances and conditions" as written in section 3 refers to matters of carriage and does not include competition ..... 15
*D. L. & W. R. R. Co.* v. *I. C. C.*, 166 Fed. Rep. 499 ..... 21
*I. C. C.* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 166 ..... 19
*I. C. C.* v. *D. L. & W. R. R. Co.*, 220 U. S. 235; 253 ..... 22
*Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 444, 445, 446 ..... 23
*Penn. R. R. Co.* v. *International Coal Min. Co.*, 173 Fed. Rep. 1, 4 ..... 20
*Wight* v. *United States*, 167 U. S. 512 ..... 18
III. It is too late to argue that the order is so indefinite and uncertain that it can not be complied with ..... 23

# In the Supreme Court of the United States

OCTOBER TERM, 1920.

SEABOARD AIR LINE RAILWAY CO., ET AL., Appellants,
*v.*
UNITED STATES OF AMERICA, ET AL.
No. 27.

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA.*

## BRIEF FOR THE UNITED STATES.

### STATEMENT.

The sole question is the power of the Interstate Commerce Commission to direct the rail carriers serving Richmond, Virginia, to cease and desist from the practice of discriminating in charges for switching car load traffic handled under circumstances and conditions within the switching limits which the Commission found to be similar.

Seaboard Air Line Railway Co., Southern Railway Co., and Atlantic Coast Line Railway Co. operate lines aggregating approximately 15,000 miles, substantially all of which are located south of the Ohio and Potomac Rivers and east of the Mississippi (Tr. 3). Within that territory are located the terminal cities of Richmond, Norfolk, Louisville, Cincinnati, Charleston, and Memphis. In each city there

has been established what is familiarly known as the "switching limits," i. e., the boundaries of the terminals on and over which carriers receive and deliver traffic from and to the main lines by switching.

With the exception of Richmond[1] in all of these several cities the carriers receive and deliver traffic through interchange switching on the line-haul rate, each main line paying to the switching line the latter's charge for the service and absorbing the same in the line-haul rate (Tr. 26, 30, 33).

That practice also prevailed at Richmond until November 6, 1909, when the carriers published and filed tariffs by which the three carriers named "ceased

---

[1] Complaint before the Commission (Tr. 26):

"That said increased charges are unreasonable and unjust and subject the members of complainant's association, their traffic, and the city of Richmond to undue and unreasonable prejudice and disadvantage as compared with other competitive points, particularly Norfolk, Va., Louisville, Ky., Cincinnati, Ohio, St. Louis, Mo., Memphis, Tenn. * * *."

Report of the Commission (Tr. 30, 33):

"The resulting increased transportation charges are alleged to be unreasonable and to unduly discriminate between shippers in Richmond and against Richmond shippers as compared with shippers at Norfolk, Va.; Memphis, Tenn.; Louisville, Ky.; Cincinnati, Ohio; and St. Louis, Mo., where different practices are said to obtain. * * *

"A portion of the connecting-line switching on trap and station-order cars and all of connecting-line switching on carload shipments of coal and coke are absorbed despite the nonexistence of the competition now made a condition precedent to the absorption of other carload switching. On trap and station-order cars this absorption is voluntary; on coal and coke, according to defendants, it is made because the Chesapeake & Ohio delivers coal from its West Virginia mines anywhere in Richmond at the Richmond rate. But under its broad definition of competition the Chesapeake & Ohio also delivers anywhere in Richmond at the Richmond rate considerable other carload traffic, and we do not see why its practice should exert a controlling influence only as to coal and coke. It is true that the nature of these commodities renders this traffic largely competitive commercially, but we do not think this justifies the discrimination, nor is this phase of competition embraced in the principle here advanced. Absorption is made on intrastate shipments of fertilizer because the railroad commission

their indiscriminate absorption of connecting-line switching charges on carload traffic at Richmond, Va., and provided that thereafter such switching charges would be absorbed only when the carrier performing the transportation service was in competition for the traffic with the switching line" (Tr. 21, 30, 40, 42). Coal and coke have never been included in the non-absorption provisions (Tr. 31).

On January 6, 1912, Richmond Chamber of Commerce, "composed of manufacturers, merchants, and business men of the city of Richmond, Virginia, having as one of its objects the promotion of the welfare and business interests of the said city," whose several

---

of Virginia has withheld its approval of the proposed nonabsorption of this traffic. Furthermore, at Norfolk, Va., switching charges on traffic from the Norfolk and Portsmouth Belt Line are absorbed, although the belt line can not in any way be a competitor for the line haul. It is urged that the belt line, owned jointly by the carriers serving Norfolk and Portsmouth, is in reality but an extension of the terminals of each road and that the switching charge paid the belt line by the line carriers is but their respective contributions to the maintenance of their joint property.

"At Charleston, S. C., almost the same condition obtains with respect to the Charleston Terminal Company. At Louisville, Ky., the general rule published in the tariff of the Southern Railway, is that connecting-line switching charges on carload traffic, trap and station-order cars, both competitive and noncompetitive, will be absorbed when the net revenue of the Southern is not less than $12 per car. This defendant explains that Louisville is practically in official classification territory, where the more liberal absorption rule prevails, and that its practice at Louisville is controlled by the practice of the carriers with whom it competes for Louisville traffic; that these lines do not take the same view of switching absorption as the Southern Railway: and that it can not be alone in the enforcement of the restricted theory if it is to obtain business. The carriers at Louisville apply the trunk-line rule, while the Southern lines at Richmond, after considerable controversy, have agreed upon a narrower view. At Memphis, Tenn., connecting line switching on trap and station-order cars to or from other than local stations on its Memphis division is absorbed by the Southern Railway, because, it alleges, the business district at Memphis has gradually moved from its terminals and it must make this sacrifice to place itself on a competitive basis with the other lines."

members "are engaged in manufacturing and in buying and selling various commodities and shipping the same between Richmond and various points in other States over the lines of defendants and their connections," filed a complaint alleging that the additional charges resulting from the nonabsorption of the switching charges caused "undue preference and advantage to certain other industries at Richmond, all of which is in violation of the act to regulate commerce," etc. (Tr. 21, 26).

After a hearing, the Commission filed a report (Tr. 29) and entered an order directing the carriers to cease and desist (Tr. 38). Subsequently, on application of both sides, an order was entered reopening the case (Tr. 39). Additional evidence was adduced. The only pretense of any defense or justification ever advanced by the carriers at either hearing for this unquestioned discrimination was that where two or more of the carriers served any point of origin or destination, however far distant from Richmond, at which they competed for the traffic, the circumstances and conditions were dissimilar from those in which one carrier alone served the point and there was no competition, in which latter case the additional charge for switching at Richmond was justified. The Commission said (Tr. 46): "The precise point is best illustrated by a practical example. The accompanying diagram shows the situation. Oxford, N. C., is a point reached both by the Southern and the Seaboard, but not by the Chesapeake & Ohio. Norlina, N. C., is

a local point on the Seaboard. Assume that industries A, B, and C on the Seaboard, the Southern, and the Chesapeake & Ohio, respectively, are similarly located with regard to the interchange tracks of the three carriers at Richmond. On traffic from Oxford to industry B on the Southern, the Seaboard will absorb the Southern's switching charges. But on traffic from Oxford to industry C, on the Chesapeake & Ohio, the Seaboard refuses to absorb the Chesapeake & Ohio's switching charges. On traffic from and to Norlina, a local point, however, the Seaboard refuses to absorb all switching charges whatsoever to any off-line industry."

On April 28, 1917, the Commission filed its final report and order (Tr. 40, 63) directing the three carriers named (44 I. C. C., 455)—

> to cease and desist on or before August 1, 1917, and thereafter to abstain, from absorbing switching charges on certain interstate carload freight at Richmond, Va., while refusing to absorb such charges on like carload shipments for a like and contemporaneous service under substantially similar circumstances and conditions, such practices having been found in said supplemental report to be unjustly discriminatory and unlawful within section 2 of the act to regulate commerce;

and—

> to establish, on or before August 1, 1917, * * * and thereafter to maintain and apply uniorm regulations and practices for the absorption of charges for the switching of inter-

state carload freight at Richmond, Va., and to collect no higher rates or charges from shippers and receivers of such carload freight at Richmond, Va., than they contemporaneously collect from any other shipper or receiver of such carload freight at Richmond, Va., for a like and contemporaneous service under substantially similar circumstances and conditions.

On November 6, 1917, the petition was filed. On the present record the hearing on application for interlocutory injunction was had before Circuit Judges Pritchard and Woods and District Judge Waddill. On January 19, 1918, a full opinion was filed, Judges Pritchard and Waddill concurring (Tr. 74), Judge Woods dissenting. An order was entered denying the application for interlocutory injunction and directing that the petition be dismissed. (249 Fed. Rep. 368.)

Thus, with practically the entire commercial world, the entire immediate business interests of the city of Richmond, the practice of absorbing all switching charges on coal and coke, the order of the Commission, and the opinion and decree of the District Court all against them, the appellants, staggering under the weight of that load, now ask this court to substitute its judgment for that of the Commission and reverse the decree.

## BRIEF AND ARGUMENT.

### I.

**THE FINDINGS OF THE COMMISSION ARE CONCLUSIVE THAT THE TRAFFIC ON WHICH THE SWITCHING CHARGES ARE ABSORBED OR NONABSORBED IS HANDLED IN THE RICHMOND SWITCHING DISTRICT UNDER SIMILAR CIRCUMSTANCES AND CONDITIONS.**

Section 2 provides (24 Stat. 379):

> That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

*Texas & Pacific Ry.* v. *I. C. C.* (162 U. S. 197, 233):

> The conclusions that we draw from the history and language of the act, and from the decisions of our own and the English courts, are mainly these: * * * in considering whether any particular locality is subjected to an undue preference or disadvantage, the welfare of the communities occupying the

localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment.

The carriers contend that the discrimination in the nonabsorption of the switching charges is justified by competition.

But the carriers themselves are divided and inconsistent on just what the competition is which they claim; and if they are divided and inconsistent, and do not know what the competition is, their position is weak when they ask the court to work out a solution for them by which to overthrow the order.

The Commission found (Tr. 34, 35):

> If absorption practices are to be uniform, as defendants contend they should be, and if they are to be based upon a definite principle, there is no reason why that principle should not be uniformly applied. At Richmond a certain theory is employed because the southern lines have agreed to employ it; at other cities an entirely different theory exists, not because of any difference in the matter of carriage, but because such different theory best suits the carriers serving those points. In other words, the southern lines would apply the restricted theory wherever they can and would conform to a different practice at places whose policy they can not seriously influence. * * *
>
> If it be true that absorption must be governed entirely by competitive influences, it may well be argued that only that competition

which is compelling should be recognized. All of these defendants contend that absorption is compelled when there is competition with the switching lines, but the southern carriers insist that this is the only competition which is compelling. If the shipment originate at a point common to all of the southern lines, destined to an industry in Richmond on the tracks of the Chesapeake & Ohio, the traffic is certainly competitive to Richmond, but because the Chesapeake & Ohio is not a competitor the switching charge of that line is not absorbed. In other words, such traffic ceases to be competitive upon its arrival at Richmond.

The Commission further found (Tr. 45, 46):

It is a general rule among the carriers serving Richmond that switching charges will only be absorbed when compelled by competition. But the so-called trunk lines, as distinguished from the southern lines, give a different meaning to the term "competition." The Chesapeake & Ohio and the Richmond, Fredericksburg & Potomac consider all traffic competitive "where two lines operate between different points regardless of the location of the industry;" that is to say, that traffic is competitive where a point is served by more than one line even though an industry at such point may be on the local terminals of but one of the carriers. The Coast Line, the Seaboard, and the Southern treat as competitive only that traffic for which the switching line is in competition with the line-haul carrier. In

> other words, the Chesapeake & Ohio and the Richmond, Fredericksburg & Potomac absorb switching charges on traffic destined to or coming from all common points irrespective of whether or not the switching carrier reaches the common point with its own rails, while the southern carriers will absorb the switching charges only on traffic to and from a community which the switching line actually reaches.

Moreover, on a full record and with these divided and conflicting views of the carriers the Commission made full findings of fact, in which it found that the circumstances and conditions were similar with respect to all traffic handled in the switching district. These findings are conclusive and beyond the power of the courts to review.

All presumptions are in favor of the validity of the order. *I. C. R. R. Co.* v. *I. C. C.*, 206 U. S. 454; *I. C. C.* v. *C. R. I. & P. Ry. Co.*, 218 U. S. 88, 110.

*I. C. C.* v. *I. C. R. R. Co.*, 215 U. S. 452, 470, 477, 478:

> Power to make the order and not the mere expediency or wisdom of having made it is the question.

*I. C. C.* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547:

> In determining these mixed questions of law and fact the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have a

similar ruling. "The findings of the Commission are made by law prima facie true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience." *I. C. R. R. Co.* v. *I. C. C.*, 206 U. S. 441.

Unless a controlling question of law was clearly erroneously decided the order will stand. *B. & O. R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481, 494.

*I. C. R. R. Co.* v. *I. C. C.*, 206 U. S. 441, 457, 459, 466:

> In all these cases, therefore, there was a single, distinct, and dominant proposition of law which the Commission had rejected, and the exact influence of which, in its decisions, could be estimated. * * * And the propositions of appellant are inferences of mixed law and fact, hence disputable, may be overcome or counterpoised, and, therefore, the court in reaching its ultimate judgment may have given them all the weight to which they were entitled. * * * The question submitted to the Commission, as we have said, with tiresome repetition, perhaps, was one which turned on matters of fact. In that question, of course, there were elements of law, but we can not see that any one of these or any circumstances probative of the conclusion was overlooked or disregarded.

*C. H. & D. Ry. Co.* v. *I. C. C.*, 206 U. S. 142, 154:

> The statute gives prima facie effect to the findings of the Commission, and when those findings are concurred in by the Circuit Court we think they should not be interfered with,

> unless the record establishes that clear and unmistakable error has been committed. (Cited with approval in *I. C. R. R. Co.* v. *I. C. C.*, 206 U. S. 466.)

Competition and the weight to be given to it do not present questions of law.

*I. C. R. R. Co.* v. *I. C. C.*, 206 U. S. 441, 465:

> It must not be overlooked that the Commission and the Circuit Court found that the advance in the case at bar was made by agreement between the roads, and was not the individual action of each, induced by competition. It is true the contrary fact is asserted. It is asserted that such action was the result of competition, and that the "legal value" to which competition was entitled was not given it. The argument to support the contention has not convinced us. The inquiry was essentially one of fact, and the attempt to make competition an inference of law and dominating against the findings of the Commission and their affirmance by the Circuit Court we have already rejected.

*United States* v. *L. & N. R. R. Co.*, 235 U. S. 314, was a case in which it was sought to make competition the controlling question of law, and it was held that even though the facts before the Commission were undisputed, nevertheless the conclusions reached by the Commission on such undisputed facts should not be disturbed by the courts. The Chief Justice said (320):

> The Commerce Court, finding that there was no conflicting or disputed evidence concerning

the origin and character of the reshipping privilege, concluded that whether such privilege was an undue preference was not a matter of fact but a question of law upon which it was its duty to reach an independent conclusion. The court, therefore, among other considerations because the privilege was of long standing and was justified by water competition at Nashville, declared it to be not unlawful and not preferential. A preemptory injunction was allowed restraining the enforcement of the order of the Commission. And the correctness of this action is the question here for decision.

In view of the doctrine announced in *Interstate Com. Com.* v. *Illinois Cent. R. R.*, 215 U. S. 452; *Interstate Com. Com.* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235; *Interstate Com. Com.* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, it plainly results that the court below, in substituting its judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a right to do so, obviously exerted an authority not conferred upon it by the statute. It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed. *East Tenn., &c., Ry. Co.* v. *Interstate Com. Com.*, 181 U. S. 1, 23–29. And the amendments by which it came to pass

> that the findings of the Commission were made not merely *prima facie* but conclusively correct in case of judicial review, except to the extent pointed out in the Illinois Central and other cases, *supra*, show the progressive evolution of the legislative purpose and the inevitable conflict which exists between giving that purpose effect and upholding the view of the statute taken by the court below. It can not be otherwise since if the view of the statute upheld below be sustained, the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action.

See also *Procter & Gamble Co.* v. *United States*, 225 U. S. 282; *I. C. C.* v. *L. & N. R. R. Co.*, 227 U. S. 88; *A., T. & S. F. Ry. Co.* v. *United States*, 231 U. S. 736; *Pre-cooling case*, 232 U. S. 199; *Los Angeles Switching case*, 234 U. S. 294; *Penn. R. R. Co.* v. *United States*, 236 U. S. 351; *L. & N. R. R. Co.* v. *United States*, 238 U. S. 1; *O'Keefe, Receiver*, v. *United States*, 240 U. S. 294; *United States* v. *M. & M. Traffic Asso.*, 242 U. S. 178.

Circuit Judge Pritchard, in denying the motion for injunction, said (Tr. 78):

> We are of opinion that the act in question confers upon the Interstate Commerce Commission the power of determining as to whether the services rendered are "like and contemporaneous"; also as to whether the respective traffic was "of a like kind." Further, as to whether the transportation was made under "substantially similar circum-

stances and conditions." *Texas & P. R. Co.* v. *I. C. C.*, 162 U. S. 197. While the act does not undertake to define the particular acts which constitute unlawful discrimination, it undoubtedly commits that to the Commission and its findings are conclusive. *I. C. C.* v. *Ill. Cent. R. Co.*, 215 U. S. 452; *I. C. C.* v. *D. L. & W.*, 220 U. S. 235; *Pa. R. Co.* v. *International Coal Co.*, 230 U. S. 184; *L. & N. R. Co.*, 235 U. S. 314.

The findings of fact by the Commission are conclusive, and we concur with them in their conclusions of law.

## II.

**THE PHRASE "UNDER SUBSTANTIALLY SIMILAR CIRCUMSTANCES AND CONDITIONS" AS WRITTEN IN SECTION 2 REFERS TO MATTERS OF CARRIAGE AND DOES NOT INCLUDE COMPETITION.**

Assuming, for the purposes of the argument only, that clear, free, and unrestricted competition existed and had been practiced among the several carriers at distant points of origin for traffic to be transported and delivered within the Richmond switching district, that would avail the appellants nothing, as such competition would not, under section 2, justify the condemned discrimination, and the Commission and the District Court committed no error of law in so holding.

The Commission said (Tr. 47):

> But we are of the opinion that the present practices of the carriers serving Richmond are unlawful within section 2 of the act.

Complainant insists that when the line-haul carrier reaches the common point and competes for the traffic to or from Richmond proper, the absorption of the switching charges should not be confined to that traffic for which the switching line competes for the entire haul. That is, if the Seaboard absorbs the switching charges for the shipper on the terminal tracks of the Southern, it should also absorb the switching charges for the shipper on the terminal tracks of the Chesapeake & Ohio. Unless this is done, complainant contends that the two shippers are not upon an equality, since the Seaboard pays for a delivery service to shippers on the terminal tracks of the Southern and declines to pay for a similar delivery service to shippers on the terminal tracks of the Chesapeake & Ohio. This treatment, complainant argues, is similar to that condemned by the Supreme Court in *Wight* v. *United States*, 167 U. S. 512.

Section 2 is primarily directed against discrimination between shippers located in the same community. It is aimed to put all shippers within a switching district upon a substantial equality. It provides that where a carrier receives from any person a greater compensation for any service rendered in the transportation of passengers or property than it receives from any other person for doing for him a "like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination," a

discrimination which is prohibited and declared to be unlawful. Under this section it is settled that the competition of rival carriers as such does not constitute substantially dissimilar circumstances to justify a difference in treatment. *Wight* v. *United States, supra; I. C. C.* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 146. * * *

As we have shown in the recent case of *Wight* v. *United States*, 167 U. S., 512, the purpose of the second section is to enforce equality between shippers over the same line and to prohibit any rebate or other device by which two shippers shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor; and we there held that the phrase "under substantially similar circumstances and conditions," as used in the second section, refers to the matter of carriage and does not include competition between rival routes.

We are of the opinion that the principles underlying the Wight case, *supra*, and the Alabama Midland case, *supra*, are controlling here.

The District Court concurred (Tr. 76, 78):

The first question arising in this case is as to whether the industries situated on the following railroads: Richmond, Fredericksburg & Potomac, Seaboard Air Line, Atlantic Coast Line, Chesapeake & Ohio, and Southern are to be treated as a unit—that is a group of industries engaged in doing business at Rich-

> mond? If they are, then we think the solution of this problem becomes comparatively easy. All the shipments in question are billed to and received at Richmond, and are therefore similarly situated. It was obviously the intention of Congress in the enactment of section 2, above quoted, to secure precisely the same kind of treatment for all industries that are similarly situated. We think that the case of *Wight* v. *United States, supra*, and *I. C. C.* v. *Alabama Midland Railroad Company, supra*, are decisive of the points involved in this question.

*Wight* v. *United States* was a prosecution under section 2. The defense was that the competition between two rival carriers justified the allowance and that the traffic was not under "substantially similar circumstances and conditions." In rejecting that defense the Supreme Court said (517, 518):

> Whatever the Baltimore and Ohio Company might lawfully do to draw business from a competing line, whatever inducements it might offer to the customers of that competing line to induce them to change their carrier, is not a question involved in this case. The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road—and to forbid it by any device to enforce higher charges against one than another. * * * But the service performed in transporting from Cincinnati to the depot at Pittsburgh was precisely alike for each. The one shipper paid 15 cents a

> hundred; the other, in fact, but 11½ cents. * * * It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor. * * * *For this case it is enough to hold that the phrase as found in section 2 refers to the matter of carriage, and does not include competition.*

It is argued, however, that *Wight* v. *United States* was a criminal case, controlled by the criminal laws, enforced by the criminal court; that here we have a civil suit in a court of equity; that the statute should receive a liberal construction and broader principles should control.

In the enforcement of the statute the principles do not change according as the case is before a criminal court or a court of equity. *Wight* v. *United States* has been cited with approval and the principles therein announced adopted in subsequent civil cases. *I. C. C.* v. *Alabama Midland Ry.*, 168 U. S. 144, a civil suit brought to enforce an order: (166)

> As we have shown in the recent case of *Wight* v. *United States*, 167 U. S. 512, the purpose of the second section is to enforce equality between shippers over the same line, and to prohibit any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor; *and we there held*

*that the phrase "under substantially similar circumstances and conditions," as used in the second section, refers to the matter of carriage and does not include competition between rival routes.*

This view is not open to the criticism that different meanings are attributed to the same words when found in different sections of the act; for what we hold is that, as the purposes of the several sections are different, *the phrase under consideration must be read, in the second section, as restricted to the case of shippers over the same road, thus leaving no room for the operation of competition,* but that in the other sections, which cover the entire tract of interstate and foreign commerce, a meaning must be given to the phrase wide enough to include all the facts that have a legitimate bearing on the situation, among which we find the fact of competition when it affects rates.

*Penn. R. R. Co.* v. *International Coal Mining Co.*, 173 Fed. Rep. 1, Circuit Court of Appeals for the Third Circuit (Circuit Judges Dallas, Gray, and Buffington): (4)

In *Wight* v. *United States*, 167 U. S. 513, it was sought to differentiate the service performed by the different terminal facilities of the two shippers at their respective warehouses; but the court held these were not the circumstances and conditions of the act, but that the circumstances and conditions the act contemplated were those *which affected the actual carriage of the freight*, using this language:

"It was the purpose of this act to enforce equality between shippers, and it prohibits

any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay."

And that this phrase "circumstances of carriage" was a carefully chosen one, limiting the circumstances to such as affected haulage of freight, is shown in *I. C. C.* v. *Alabama R. Co.*, 168 U. S. 166, where, referring to *Wight* v. *United States, supra*, the court say:

"We there held that the phrase, 'under substantially similar circumstances and conditions,' as used in the second section, refers to the matter of carriage, *and does not include competition between rival routes.*"

*It follows, therefore, that if these circumstances and conditions of section 2 are those which affect haulage, and do not include competition between rival routes, they do not include individual elements affecting individual shippers.* The purpose of the section is to afford identity of rate for substantial identity of transportation service, and anything that does not aid in determining what is such substantial identity of haulage does not aid in the application of the section.

*D., L. & W. R. R. Co.* v. *I. C. C.*, 166 Fed. Rep. 499, known as the *Forwarders case*, Circuit Court adopted the reasoning and conclusions expressed in the dissenting opinion of a member of the Commission, viz, "To sum up the decisions under section 2, we find in the *Wight case that competition of a rival carrier is not a differentiating circumstance.*" (512)

*I. C. C.* v. *D., L. & W. R. R. Co.*, 220 U. S. 235, 253 (reversing 166 Fed. Rep. 499 on other grounds):

> But this argument, in every conceivable aspect, amounts only to saying that a provision of the statute which was plainly intended to prevent inequality and discrimination has resulted in bringing about such conditions. Moreover, the unsoundness of the contention is demonstrated by authority. It is not open to question that the provisions of section 2 of the act to regulate commerce was substantially taken from section 90 of the English railway clauses consolidation act of 1845, known as the equality clause. *Texas & Pac. Railway* v. *Interstate Com. Com.*, 162 U. S. 197, 222. Certain also is it that at the time of the passage of the act to regulate commerce *that clause in the English act had been construed as only embracing circumstances concerning the carriage of the goods and not the person of the sender, or in other words, that the clause did not allow carriers by railroad to make a difference in rates because of differences in circumstances arising either before the service of the carrier began or after it was terminated.* It was therefore settled in England that the clause forbade the charging of a higher rate for the carriage of goods for an intercepting or forwarding agent than for others. *Great Western R. Co.* v. *Sutton*, 1869, L. R. 4 H. L. 226; *Evershed* v. *London & N. W. Ry. Co.*, 1878, 3 App. Cas. 1029; and *Denaby Main Colliery Co.* v. *Manchester, etc., Ry. Co.*, 1885, 11 App. Cas. 97. And it may not be doubted that the settled meaning which was affixed to the

> English equality clause at the time of the adoption of the act to regulate commerce applies in construing the second section of that act, certainly to the extent that its interpretation is involved in the matter before us. *Wight* v. *United States*, 167 U. S. 512; *Interstate Commerce Commission* v. *Alabama M. R. Co.*, 168 U. S. 144, 166.

*Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 444, 445, 446:

> If the shipper were the owner, an allowance to him of a percentage upon the freight as an inducement to ship by that line, however honest and however justifiable on commercial principles, would be contrary to the act to regulate commerce as it now stands. Act of June 29, 1906, c. 3591, section 2, 34 Stat. 586, 587, amending section 6 of the original act, etc. See also the original act of February 4, 1887, c. 104, section 2, 24 Stat. 379. *Wight* v. *United States*, 167 U. S. 512. * * * Any payment made by a carrier to a shipper in consideration of his shipping goods over the carrier's line comes within the prohibiting words.

## III.

**IT IS TOO LATE TO ARGUE THAT THE ORDER IS SO INDEFINITE AND UNCERTAIN THAT IT CAN NOT BE COMPLIED WITH.**

On April 28, 1917, the order was entered, effective August 1, 1917 (Tr. 62). Various extensions of the effective date were made (Tr. 64), but none beyond January 1, 1918 (Tr. 65). On November 6, 1917, the

petition was filed. On January 19, 1918, the final opinion and decree dismissing the petition were filed. The order not having been suspended, it presumably had been put in full force and effect when the decree of the court was entered.

By its own terms and by law the order expired by limitation on January 1, 1920. As the obligations imposed by the order appear long since to have been completely discharged by the carriers, to the great relief and satisfaction of the shippers and consignees within the entire switching district of Richmond, it is now rather late to argue to this court that "the order is so indefinite and uncertain that it can not be complied with," and "should be restrained and enjoined for this reason" (Apps. Br. 84).

The decree of the District Court should be affirmed.

WILLIAM L. FRIERSON,
*Solicitor General.*

BLACKBURN ESTERLINE,
*Special Assistant to the Attorney General.*

OCTOBER, 1920.

○